Supreme Court, U.S.
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941624 APR 3 - 1995

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No. _____

In The

Supreme Court of the United States

October Term, 1994

GORDON HAGER,

Petitioner,

vs.

LINDA LARGENT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a court violate a government official's substantive qualified immunity defense when it orders the official to be deposed prior to a ruling on a motion for summary judgment that asserts qualified immunity, thus contravening *Siegert v. Gilley*, 500 U.S. 226, 114 L.Ed.2d 277, *reh. denied*, 115 L.Ed.2d 1084 (1991)?

PARTIES

The parties in the proceedings below are Plaintiffs, Linda Largent and Iris Esparza, Administratrix of the Estate of Stanley Lester Poynor, Deceased, who were also the Appellees before the Fifth Circuit Court of Appeals; and Defendants, City of Dallas, Texas and Gordon Hager. Since Defendant City of Dallas was not a party to Hager's appeal before the Fifth Circuit Court of Appeals, the City of Dallas is not named as a party herein.

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In The

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GORDON HAGER,

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LINDA LARGENT, et al.,

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On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Gordon Hager respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on January 3, 1995.

OPINIONS BELOW

The opinion of the Fifth Circuit is not reported and is set out in the Appendix, App. 1 through 10, *infra*. The orders of the United States District Court for the Northern District of Texas, Dallas Division, are not reported

and are set out in the Appendix, App. 11 through 20, *infra*. A brief summary of those documents is included in the Statement of the Case, *infra*.

JURISDICTION

This petition seeks review of the January 3, 1995, judgment and opinion of the Fifth Circuit Court of Appeals in No. 94-10520. No petition for rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is filed within ninety (90) days of the date of the Fifth Circuit's judgment and opinion, as required by 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves the application of Petitioner's qualified immunity defense, as set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and *Siegert v. Gilley*, 500 U.S. 226, 114 L.Ed.2d 277, *reh. denied*, 115 L.Ed.2d 1084 (1991), to Respondents' Fourth Amendment claims of excessive force and wrongful death in an action brought pursuant to 42 U.S.C. § 1983.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides:

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondents bring this action seeking damages against Petitioner under 42 U.S.C. § 1983. Jurisdiction of such claims is provided in 28 U.S.C. § 1331. Petitioner's interlocutory appeal to the United States Court of Appeals for the Fifth Circuit arose from a decision of the United States District Court final in effect and collateral, i.e., denial of a claim of qualified immunity. The Fifth Circuit Court of Appeals had jurisdiction of the appeal pursuant to 28 U.S.C. § 1291, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) and *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). App. 5.

Respondents Linda Largent and Iris Esparza, the mother and sister, respectively, of Stanley Lester Poynor, filed suit against the City of Dallas and Petitioner Gordon Hager, a Dallas police officer, alleging violations of federal and state law arising out of the shooting death of Mr. Poynor. *See* district court's Docket and Rec. 1. Largent and Esparza sued Hager in both his individual and official capacity. *Id.* Largent and Esparza seek recovery under 42 U.S.C. § 1983 and Texas law alleging unlawful excessive force and wrongful death of Stanley Poynor. Rec. 1-8.

Defendants' Motion for Summary Judgment and Brief was filed on February 26, 1993, and Petitioner asserted, *inter alia*, that qualified immunity barred Largent and Esparza's claims against him. Rec. 44. Petitioner's affidavit and the affidavit of other witnesses accompanied the motion. *Id.* Defendants' Motion for Protective Order to Stay Discovery and Brief was filed concurrently with the motion for summary judgment. Rec. 158. Petitioner asserted, *inter alia*, that discovery should be stayed pending the resolution of the qualified immunity issue asserted in the motion for summary judgment. *Id.*

Largent and Esparza responded to the motions, and attached the transcript of a private investigator's interview with prospective witness Brian Blakley, who allegedly observed the shooting incident from his second-floor apartment. Largent and Esparza also moved for an expedited consideration of Defendants' Motion for Protective Order to Stay Discovery. Rec. 158, 199 and 211. After hearing, the district court ruled that, with the exception of the deposition of Largent and Esparza's prospective witness (Blakley), discovery was stayed

pending disposition of the motion for summary judgment. App. 12-13. The district court further ruled that the deposition of Brian Blakley could be taken at a time to be agreed upon by counsel or upon proper notice. *Id.*

Largent and Esparza did not seek to depose Brian Blakley, either by agreement or by proper notice. Some time passed. The district court, *sua sponte,* ordered its previous Scheduling Order vacated, directed the parties to file any additional briefs concerning the pending motion for summary judgment, and vacated the order staying discovery "[i]n view of the age of this case." App. 14. Petitioner filed a motion to reconsider the vacation of the discovery stay. Rec. 270. As a result, the district court re-issued an order staying all discovery until the motion for summary judgment was finally resolved. App. 15-16.

Later the district court, *sua sponte,* partially vacated its most recent discovery stay for the single purpose of allowing Largent and Esparza to take Petitioner's deposition, and stayed a decision on the motion for summary judgment until Petitioner's deposition was transmitted to the court. App. 17-18. Again, Petitioner sought reconsideration of the court's order allowing discovery; the court denied Petitioner's motion. App. 19-20. Petitioner timely appealed the district court's Orders (dated May 2 and 19, 1994) vacating the stay of discovery for the purpose of taking his deposition, since it involved a question of law regarding Petitioner's substantive qualified immunity defense. Rec. 310-311.

The Fifth Circuit Court of Appeals, in a per curiam opinion, affirmed the district court's decisions. App. 1-10. Specifically, the Fifth Circuit held that *Siegert v. Gilley*

"does not prevent the district court from postponing ruling on Hager's qualified immunity defense pending his deposition." App. 8. As a result, the Court of Appeals dismissed the appeal. App. 2, 10.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Decision That Petitioner Must Be Deposed Pending the District Court's Ruling On a Qualified Immunity Motion for Summary Judgment Conflicts With Decisions of This Court and Other Circuits.

This cause concerns Petitioner's substantive qualified immunity defense. Specifically, the issue is whether a court violates a government official's substantive qualified immunity defense when it orders the official to be deposed prior to a ruling on a motion for summary judgment that asserts qualified immunity, thus contravening this Honorable Court's decision in *Siegert v. Gilley*, 500 U.S. 226, 114 L.Ed.2d 277, *reh. denied*, 115 L.Ed.2d 1084 (1991). The Supreme Court, in addressing issues close to this question, has progressively enhanced the protection afforded by the qualified immunity defense in cases brought under 42 U.S.C. § 1983. The rulings by the courts in this case below, however, substantially erode the substantive protection the immunity defense provides, particularly in the face of a pending motion asserting qualified immunity.

Public officials who act within the scope of their discretionary authority and in the course of their official responsibilities are entitled to the defense of qualified

immunity, which shields them from suit as well as from liability for civil damages, where their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Davis v. Scherer*, 468 U.S. 183 (1984), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *See also Malley v. Briggs*, 475 U.S. 335 (1986); and *Pierson v. Ray*, 386 U.S. 547 (1967). Petitioner, as a police officer, is specifically entitled to assert this qualified immunity defense. *See Anderson v. Creighton*, 483 U.S. 635 (1987). This defense, in substantially the same structure, is available to Texas government officials against whom suit is brought, as here, alleging state law violations. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 655-57 (Tex. 1994); and *Dent v. City of Dallas*, 729 S.W.2d 114, 117 (Tex.App. – Dallas 1987, writ ref'd n.r.e.), *cert. denied*, 485 U.S. 977 (1988).

The Supreme Court has instructed that qualified immunity means immunity from having to stand trial, not simply immunity from monetary liability. *Siegert v. Gilley*, 500 U.S. 226, 114 L.Ed.2d 277, *reh. denied*, 115 L.Ed.2d 1084 (1991) ("one of the purposes of immunity . . . is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon the defending of a long, drawn out lawsuit"). *Siegert* is this Honorable Court's recent pronouncement clarifying the scope of the qualified immunity defense, further outlining both the immunity's analysis and protections, and is similar (from a procedural standpoint) to this case. *Siegert* follows several other cases that, over the years, have defined qualified immunity. *See*, e.g., *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1982) ("the entitlement is an

immunity from suit rather than a mere defense. . . . ") (emphasis in original).

This Court elaborated upon the relationship of the qualified immunity defense and discovery in *Anderson v. Creighton*:

> One of the purposes of the *Harlow* qualified immunity standard is to protect public officials from the "broad-ranging discovery" that can be "peculiarly disruptive of effective government." 457 U.S., at 817, 73 L.Ed.2d 396, 102 S.Ct. 2727 (footnote omitted). For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of litigation. [citation omitted]

Anderson v. Creighton, 483 U.S. at 646 n.6. This Court admonished that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Harlow v. Fitzgerald*, 457 U.S. at 818. The Supreme Court went further to say:

> Once a party seeks summary judgment on the basis of qualified immunity, the Court should stay discovery proceedings until the Court can determine whether the officials enjoy qualified immunity.

Id. Protection from discovery is necessary to preserve meaningful official immunity.

Petitioner moved for summary judgment as to Largent and Esparza's federal and state claims, asserting qualified immunity. Rec. 63-69. The district court's order sought discovery to resolve what it termed a fact issue as to Petitioner's "good faith." App. 19. The district court's order calling for Petitioner's deposition did not specify

under what analysis the "good faith" issue arose; Petitioner reasoned it to be an analysis of Petitioner's subjective good faith under state law, since an analysis of subjective good faith under federal qualified immunity principles was abolished in favor of an objective standard. *Harlow v. Fitzgerald*, 457 U.S. at 818. To the extent the district court deemed there to be a fact issue necessitating Petitioner's deposition to resolve a factual dispute regarding Petitioner's subjective good faith, that finding was error. Largent and Esparza produced no credible or admissible summary judgment evidence to create a material fact issue as to *any* of the defenses asserted in Petitioner's motion for summary judgment. Rec. 44, 211 and 257. *See also* Defendants' motions to reconsider vacation of discovery stay. Rec. 270 and 293. Absent evidence from Largent and Esparza to create such a factual dispute, Petitioner conclusively established his entitlement to qualified immunity as a matter of federal and state law. *Id.* At a minimum, Petitioner established entitlement to the substantive protection qualified immunity affords vis-a-vis discovery, at least until the immunity issue, once raised in the motion for summary judgment, was ruled upon as a matter of law. *See Harlow v. Fitzgerald*, 457 U.S. at 818; *Siegert v. Gilley*, 114 L.Ed.2d at 286.

The Fifth Circuit, however, disagreed with Petitioner's argument, and relied upon cases decided before *Siegert*. App. 7. Specifically, the Fifth Circuit relied upon *Gaines v. Davis*, 928 F.2d 705, 707 (5th Cir. 1991) and *Lion Boulos v. Wilson*, 834 F.2d 504, 507-08 (5th Cir. 1987). *Id.* Additionally, the Fifth Circuit cited with approval a Tenth Circuit case, *Maxey by Maxey v. Fulton*, 890 F.2d 279 (10th

Cir. 1989), for the identical proposition that some discovery may proceed. App. 6. *Maxey* was decided before *Siegert* as well. The other Tenth Circuit case cited by the Fifth Circuit was *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992). App. 7-8. *Workman*, although decided after *Siegert* (and even mentioned it at p. 336) analyzed the discovery question under *Anderson v. Creighton*, holding that in some instances, discovery should be stayed while in others, some discovery may be allowed. *Id.*

Fifth Circuit jurisprudence is, however, unclear. *Compare Geter v. Fortenberry*, 849 F.2d 1550, 1552 (5th Cir. 1988) (" . . . immunity in this instance means immunity from suit, not simply immunity from liability"); *Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir. 1986) ("Consequently we view the defense of qualified immunity as an *'immunity from suit,'* which 'extends beyond just a defense to liability to include all aspects of civil litigation' ") (emphasis in original); and *Elliott v. Perez*, 751 F.2d 1472, 1478 (5th Cir. 1985) (" . . . [T]hose entitled to official immunity should be free not only from ultimate liability, but also from trial, and the oft-time overwhelming preliminaries of modern litigation") with *Gaines v. Davis*, 928 F.2d at 707 (allowing depositions of defendants if scope of deposition inquiry limited to qualified immunity issue); and *Lion Boulos v. Wilson*, 834 F.2d at 507-08 (" . . . qualified immunity does not shield government officials from all discovery, but only from discovery which is either avoidable or overly broad"). It was the Fifth Circuit's reliance upon *Gaines* and *Lion Boulos*, rather than following *Siegert*, that necessitates this petition.

While it may be true that the Fifth Circuit could remedy its internal inconsistency by an *en banc* decision,

decisions from other courts in other circuits indicate inconsistent results nationwide. *Compare Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988) (discovery stayed until the issue of immunity was decided); *Marx v. Gumbinner*, 855 F.2d 783, 788 (11th Cir. 1988) (official immunity protects government officials from pretrial discovery); *Martin v. District of Columbia Metro. Police Dept.*, 812 F.2d 1425, 1430 (D.C. Cir. 1987) ("Discovery is itself one of the burdens from which defendants are sheltered by the immunity doctrine."); *Norfleet v. Ark. Dept. of Human Services*, 796 F.Supp. 1194, 1198 (E.D. Ark. 1992), *aff'd*, 989 F.2d 289 (8th Cir. 1993) (threshold question of qualified immunity must be decided before discovery proceeds); *Donald M. v. Matava*, 668 F.Supp. 703, 707 (D. Mass. 1987) (discovery not necessary or appropriate concerning the questions presented regarding qualified immunity); *Felak v. U.S.*, 661 F.Supp. 51, 54 (D. Minn. 1987) (protective order issued to stay discovey even before presentation of qualified immunity issue); *Washington v. Starke*, 626 F.Supp. 1149, 1152 (W.D. Mich. 1986) (defendant entitled to a determination on the qualified immunity issue prior to the commencement of discovery); *Dashiell v. Montgomery County*, 131 F.R.D. 102, 103 (D. Md. 1989) (discovery stayed pending ruling on defendants' motion for summary judgment); and *Gomez v. City of Nashua, N.H.*, 126 F.R.D. 432, 433 (D.N.H. 1989) (immunity protects official from discovery) with *Lugo v. Alvarado*, 819 F.2d 5, 7 (1st Cir. 1987) (discovery not stayed while qualified immunity issue pending); *Krohn v. U.S.*, 742 F.2d 24, 32 (1st Cir. 1984) (plaintiff may seek permission for discovery while immunity issue pending); *Galvin v. Lloyd*, 663 F.Supp.

1572, 1580 (D. Conn. 1987) (discovery allowed while qualified immunity issue pending in certain circumstances); *Longmire v. Alabama State University*, 151 F.R.D. 414, 419 (M.D. Ala. 1992) (qualified immunity not a shield against discovery); and *Denton v. Twyford*, 142 F.R.D. 140, 142 (S.D. Ohio 1992) (immunity does not entitle potentially immune defendant to avoid submitting to discovery). Some of the above cases necessarily arise out of district courts where discovery disputes are more often heard; nevertheless, they indicate the nationwide inconsistency among the circuits on this question.

Subjecting officials to discovery concerning actions for which they may enjoy immunity creates the very disruption from which immunity seeks to shield them, and the Fifth Circuit had previously so held. *Elliott v. Perez*, 751 F.2d at 1487. After *Lion Boulos* and before *Gaines*, the Fifth Circuit emphasized that public officials asserting the qualified immunity defense are protected from discovery until the immunity question is resolved. *See Nieto v. San Perlita Independent School Dist.*, 894 F.2d 174, 177 (5th Cir. 1990). To reiterate, the standard in the Fifth Circuit and other Circuits, regarding discovery when immunity is raised, is not clear, in light of *Siegert*.

To the extent the district court's order calling for Petitioner's deposition is read to address Petitioner's state law qualified immunity defense, such a reading would not alter the analysis. The law regarding qualified immunity in Texas no longer employs a subjective good faith analysis, but instead now adopts the *Harlow* objective principles when analyzing an officer's entitlement to qualified immunity. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 655-57 (Tex. 1994). The Dallas Court of

Appeals recently held that *Lancaster* is to be applied retroactively. *See City of Dallas v. Half Price Books*, 883 S.W.2d 374 (Tex.App. – Dallas 1994, no writ). The Fifth Circuit addressed the issue of state law summarily. App. 9.

Further applying the command of *Harlow*, and what brings this case back to *Siegert*, is the requirement that suits against government officials are subjected to a heightened pleading standard, so that their allegations "do not suffice to drag officials into the mire of discovery (citation omitted)." *Smith v. Nixon*, 807 F.2d 197, 200 (D.C. Cir. 1986). According to the Fifth Circuit:

> This means that unless the pleadings sufficiently allege that the defendant reasonably should have known that his particular actions violated clearly established federal law, then summary judgment should be granted. [Footnote omitted].

Brown v. Glossip, 878 F.2d 871, 874 (5th Cir. 1989). According to the Supreme Court, a court must first determine whether the plaintiff has "allege[d] the violation of a clearly established constitutional right." *Siegert v. Gilley*, 114 L.Ed.2d at 286. If a plaintiff has so alleged, then a court must next decide whether the defendant's conduct was objectively reasonable, because "[e]ven if an official's conduct violates a constitutional right, he is entitled to the defense of qualified immunity if the conduct was objectively reasonable." *Salas v. Carpenter*, 980 F.2d 299, 305-306 (5th Cir. 1992). Therefore, the qualified immunity defense protects government officials not only from the threat of liability but also from the rigors of litigation under the *Harlow* objective standard.

What is the viability of the heightened pleading standard? It was abolished as against municipalities in *Leatherman v. Tarrant County Narcotics, Etc.*, 507 U.S. ___, 122 L.Ed.2d 517 (1993), but was recently affirmed by the Fifth Circuit as to individual government officials in *Schultea v. Wood*, ___ F.3d ___, 1995 WL 98234, 63 U.S.L.W. 2564 (5th Cir. (Tex.) March 9, 1995) (No. 93-2186). *See also Colle v. Brazos County*, 981 F.2d 237, 246 (5th Cir. 1993) ("[W]hen government officials are likely to invoke qualified immunity, we demand that a complaint state factual detail and particularity including why the defendant-official cannot maintain the immunity defense."). As an adjunct of the qualified immunity defense, the heightened pleading standard remains intact when considering qualified immunity raised by government officials. Judge Jones' concurring opinion in *Schultea* emphasized its importance, and listed numerous cases in other circuits where the heightened pleading standard has been uniformly embraced. *Id.* at p. ___ n.1. Petitioner's heightened pleading standard contention (asserted in the motion for summary judgment) brings this case squarely within the analytical framework enunciated by this Honorable Court in *Siegert*:

> The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.

Siegert v. Gilley, 114 L.Ed.2d at 289 (Kennedy, J., concurring). If a plaintiff cannot plead beyond qualified immunity, then *Siegert* mandates that no discovery should occur nor should the case proceed. *Siegert v. Gilley*, 114 L.Ed.2d at 286-287. The district court, however, did not address that issue; the Fifth Circuit rejected Petitioner's argument, App. 7, thus creating a conflict with *Siegert*.

In the instant case, Largent and Esparza's pleadings fail to allege sufficient concrete facts to avoid summary judgment based upon Petitioner's defense of qualified immunity. Largent and Esparza's broad and conclusory pleadings are deficient under the heightened pleading standard of *Harlow*. *Cf. Smith v. Nixon*, 807 F.2d 197 (D.C. Cir. 1986). This failure of Largent and Esparza to plead, or even discover, facts sufficient to overcome Petitioner's qualified immunity defense (as established in the motion for summary judgment) entitles Petitioner to enjoy the full protection of the defense of qualified immunity, as mandated under *Harlow*: (1) freedom from being subjected to any further discovery and (2) ultimately, dismissal of this case against them by granting Defendants' motion for summary judgment. *Cf. Ellsberg v. Mitchell*, 807 F.2d 204, 208 (D.C. Cir. 1986) ("We decline to license any plaintiff to embark on a fishing expedition in government waters on the basis of . . . speculation."). *See also Siegert v. Gilley*, 114 L.Ed.2d at 286.

This case closely approximates *Siegert* in another respect. The Fifth Circuit, in holding that Petitioner's deposition should proceed, decided summarily, without discussion of the heightened pleading standard, that " . . . Plaintiffs have alleged the violation of a clearly established constitutional right . . . " App. 8. *See Siegert v.*

Gilley, 114 L.Ed.2d at 287. Finally, rather than undergo a *Siegert* analysis, the Fifth Circuit instead relied upon cases decided prior to *Siegert* to deprive Petitioner of the protections to which he is entitled when asserting qualified immunity. App. 5-8. The district court's order and the Fifth Circuit's affirming opinion, therefore, should be reversed, to resolve that conflict. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

II. The Fifth Circuit's Decision That Petitioner Must Be Deposed Pending The District Court's Ruling On A Qualified Immunity Motion For Summary Judgment Raises Important And Unresolved Questions.

Qualified immunity reconciles two competing interests. One interest is the compensation of persons whose federally protected rights have been violated. Opposing that interest is the fear that personal liability will inhibit public officials in the discharge of their duties. In balancing these interests, it is inevitable that some actions are shielded. Abrogation of qualified immunity, however, is properly the exception, not the rule. *Mitchell v. Forsyth*, 472 U.S. at 526; *Harlow v. Fitzgerald*, 457 U.S. at 818. The burden of negating the defense lies with the plaintiff. *Id.*

Largent and Esparza did not seek Petitioner's deposition for purposes of responding to the motion for summary judgment or to negate qualified immunity; rather the district court directed that Petitioner's deposition be taken. App. 17-20. Petitioner's qualified immunity defense was (and is) ripe for determination without

resort to unnecessary discovery because Petitioner conclusively established his entitlement to immunity in his motion for summary judgment.

Summary judgment is appropriate in any kind of action

> . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). A motion for summary judgment is proper when the pleadings and record taken as a whole demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A party moving for summary judgment need not support his motion with affidavits or other evidence negating the non-movant's claim. To withstand a motion for summary judgment, the non-movant must present evidence sufficient to establish the existence of each element of his claim as to which he will have the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is mandatory when a party fails to establish the existence of an essential element of his case on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. at 322-324; *Washington v. Armstrong World Industries, Inc.*, 839 F.2d 1121, 1122 (5th Cir. 1988).

"[A]n application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial [is mandated]." *Harlow v. Fitzgerald*, 457

U.S. at 813. Instead of ruling upon Petitioner's qualified immunity defense, however, the district court *sua sponte* ordered Petitioner's deposition to be taken. Petitioner is entitled, however, to a resolution of the essentially legal question whether his conduct violated clearly established law. *Mitchell*, 472 U.S. at 530. The entitlement is an *immunity from suit* rather than a mere defense to liability, and like an absolute immunity, it is effectively lost if trial preparations (here, discovery) proceed before immunity is ruled upon as an initial matter of law. *Mitchell*, 472 U.S. at 526 (emphasis in original). *See Siegert v. Gilley*, 114 L.Ed.2d at 287.

To defeat a properly supported motion for summary judgment, the non-movant must adduce affirmative evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 257. Allegations in pleadings will not suffice. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249. Largent and Esparza's proffered evidence does not defeat Appellant's qualified immunity defense, since it is not admissible summary judgment proof. *See* Fed. R. Civ. P. 30(f) and 56(e); Fed. R. Ev. 801(c) and 802; *Celotex Corp. v. Catrett*, 477 U.S. at 324; and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249. The record and available admissible summary judgment evidence necessarily established that the complaint should have been dismissed against Petitioner, and also established that a reasonable person could conclude that the actions of Petitioner were lawful in light of clearly established law and in light of the information that Petitioner possessed at the time he took the actions in question, thus entitling him to qualified immunity. To reiterate, Petitioner was entitled, at the very least, to protection from discovery until qualified immunity was ruled upon.

Subsumed in this analysis, and more clearly explained in the Fifth Circuit opinion, is the notion that limited discovery may be allowed to determine whether qualified immunity is available as a matter of law. App. 7, 9. While such a "limitation" provides a certain ostensible appeal to the public policy considerations that underlie qualified immunity available to government officials, the "limited discovery" versus "full discovery" distinction is, practically speaking, a distinction without a difference. In a case alleging excessive force, a plaintiff must address several factors. *See Hudson v. McMillian*, 503 U.S. 1, 117 L.Ed.2d 156, 165-166 (1992). Discovery necessary to defeat a government official's qualified immunity in the face of such a claim would include, as far as the government official is concerned, the same discovery necessary to establish liability against the government official outright.

While it is true that "qualified immunity discovery" may not require fact finding into a plaintiff's monetary damages, certainly full discovery by both the plaintiff and the government official into a plaintiff's alleged harm and other aspects of the incident is required to fully address the qualified immunity issue. In other words, such "limited discovery" is inextricably bound up with other issues in dispute. Where is the line drawn? How much or how little discovery is appropriate to join the qualified immunity issue necessary for a court's determination? The Fifth Circuit ruled that Petitioner failed to raise this issue. App. 9. Petitioner's "failure" to limit the scope of his deposition to facts essential to his qualified immunity defense was not a "failure" under *Siegert*. *Any* discovery, while a qualified immunity issue is pending,

causes the very disruption a government official seeks to avoid by raising the defense for his protection, and becomes overbroad and unnecessary in that instance. This is particularly true where, as here, the plaintiff produces insufficient evidence to join the issue regarding Petitioner's qualified immunity.

The district court's order, and the Fifth Circuit's opinion and judgment, violate the very protection Petitioner sought below. The "limited" discovery holdings of the Fifth and Tenth Circuits, based upon an interpretation of this Honorable Court's footnote in *Anderson v. Creighton*, 483 U.S. at 646 n.6, do not afford Petitioner the protection intended or encompassed by the immunity doctrine. App. 8; and *Workman v. Jordan*, 958 F.2d at 336. As a result, clarification is needed on this important issue. *American Construction Co. v. Jacksonville, T.& K.R.Co.*, 148 U.S. 372, 384 (1893).

CONCLUSION

For the reasons stated, Petitioner respectfully submits that this Petition for a Writ of Certiorari should be granted, and that the Supreme Court should reverse the opinion and judgment of the Fifth Circuit Court of Appeals and the trial court's order vacating discovery for the purpose of allowing Petitioner's deposition to be taken, and the Supreme Court should render judgment that discovery should be stayed until Petitioner's qualified immunity issue is resolved.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10520
Summary Calendar

LINDA LARGENT, ET AL.,

Plaintiffs-Appellees,

versus

CITY OF DALLAS, TX and
GORDON HAGER, Dallas
Police Officer,

Defendants,

GORDON HAGER, Dallas
Police Officer,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
(3:92-CV-2322-R)

(Filed Jan. 3, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

PER CURIAM:

Defendant-appellant Gordon Hager (Hager) appeals the district court's order permitting plaintiffs-appellees to take his deposition. We dismiss the appeal.

Facts and Proceedings Below

At 10:00 a.m. on April 13, 1991, Hager, an off-duty Dallas police officer, was directing traffic at an intersection during the Azalea 10K, a foot race. On this rainy morning, Hager was wearing his police uniform as well as an orange reflective traffic vest with the word "Police" written on a yellow stripe. Both parties agree that a Volkswagen Jetta driven by plaintiffs' decedent Stanley Poynor (Poynor) approached the intersection where Hager was directing traffic. At this point, the parties' account of the events diverge, but both agree that Hager shot Poynor and that Poynor died as a result.

Hager alleges that he motioned for Poynor to stop in order to permit an approaching runner to cross the intersection. Although Hager initially thought Poynor was going to stop, he claims that Poynor proceeded into the intersection, struck his right leg, and knocked him onto the hood of the car. Hager allegedly grabbed a windshield wiper and remained on the hood as Poynor began to accelerate. Attempting to get the driver to stop, Hager pounded on the windshield with his right hand as he held onto the windshield wiper with his left hand. Hager asserts that Poynor did not slow down but swerved in an effort to throw him from the hood. At this point, Hager, fearing for his life, pulled out his pistol and fired several shots through the windshield. After the car came to a

halt, Hager got off the hood and asked a bystander to call the police.

Plaintiffs allege that Poynor approached the intersection, and Hager motioned to him to stop. Poynor then signalled to Hager that he was turning left into the entrance to his apartment complex and started to turn left in order to get out of the way of another car. As Poynor was turning left into his apartment complex's entrance, Hager started shaking his finger and placed his leg on Poynor's car. Then Hager allegedly climbed on the hood of the car and shot Poynor through the windshield.[1]

On October 13, 1992, Linda Largent and Iris Esparza (Plaintiffs), Poynor's mother and sister, filed suit against Hager and the City of Dallas (Defendants) in Texas state court, seeking recovery under 42 U.S.C. § 1983 and under Texas law. After removing the case to federal court, Defendants moved for summary judgment on the ground that Hager was entitled to qualified immunity and for a protective order staying discovery pending the disposition of the summary judgment motion. In support of the motion for summary judgment, Defendants attached the affidavits of Hager and two witnesses.

In their opposition to summary judgment, Plaintiffs attached the transcript of a private investigator's interview with Brian Blakley (Blakley), a witness who allegedly observed the incident from his second-floor apartment located at the intersection where Hager was directing traffic. Although Blakley stated that he did not see the actual shooting, he said that he saw Hager climb

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[1] According to the autopsy, Poynor was shot seven times.

on the hood of the car and that the car very slowly drifted ten feet with Hager on the hood. This transcript was accompanied by a notarized certificate signed by Blakley attesting that the transcript contained "a true record of [his] statement given at [the] interview."

On April 13, 1993, the magistrate judge granted Defendants' request for a stay of discovery pending the disposition of the summary judgment motion but did permit Plaintiffs to depose Blakley, who was suffering from a terminal illness.[2] On January 4, 1994, the district court vacated the order staying discovery. Defendants moved for reconsideration, and on February 16, 1994, the district court again stayed discovery until the resolution of Defendants' motion for summary judgment. On May 2, 1994, the district court vacated its previous order to allow Plaintiffs to depose Hager and delayed ruling on Defendants' motion for summary judgment pending the completion and transmittal to the court of Hager's deposition. Defendants moved for reconsideration, and on May 19, 1994, the district court denied the motion, stating that "genuine issues of material facts concerning whether or not the defendant Gordon Hager performed his duties as a police officer in good faith" would preclude summary judgment on grounds of qualified immunity. Hager appeals the district court's May 2 and May 19 orders.

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[2] The parties' briefs state that Plaintiffs have never taken Blakley's deposition.

Discussion

Ordinarily, discovery orders are interlocutory and not appealable under the final judgment rule of 28 U.S.C. § 1291. *Gaines v. Davis*, 928 F.2d 705, 706 (5th Cir. 1991). The Supreme Court, however, has held that immediate appeal may be taken from interlocutory orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 69 S.Ct. 1221, 1225-26 (1949).

In *Mitchell v. Forsyth*, 105 S.Ct. 2806, 2817 (1985), the Supreme Court held that orders denying a substantial claim of qualified immunity are immediately appealable under the collateral order doctrine. Government officials serving in a discretionary capacity are entitled to qualified immunity as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 102 S.Ct. 2727, 2738 (1982). A defendant entitled to qualified immunity is shielded from the burdens of broad discovery. *See Mitchell*, 105 S.Ct. at 2815 (stating that qualified immunity provides "an entitlement not to stand trial or face the other burdens of litigation"); *Harlow*, 102 S.Ct. at 2738 ("Until this threshold immunity question is resolved, discovery should not be allowed."). Therefore, this Circuit has held that immediate appeal by defendants asserting qualified immunity is available for certain discovery orders that are either avoidable or overly broad. *Gaines v. Davis*, 928 F.2d 705, 707 (5th Cir.

1991); *Lion Boulos v. Wilson*, 834 F.2d 504, 507-08 (5th Cir. 1987).

In *Lion Boulos v. Wilson*, the defendant appealed the district court's order compelling limited discovery before ruling on the qualified immunity issue, arguing that qualified immunity guarantees government officials immunity from all pretrial discovery. This Court dismissed the defendant's appeal and held that "qualified immunity does not shield government officials from all discovery but only from discovery which is either avoidable or overly broad." *Lion Boulos*, 834 F.2d at 507.

We identified two categories of discovery in *Lion Boulos*. First, we reasoned that "[d]iscovery designed to flesh out the merits of a plaintiff's claim before a ruling on the immunity defense or discovery permitted in cases where the defendant is clearly entitled to immunity" would be overly broad and avoidable, and thus immediately appealable. *Id.* Second, we stated that "[d]iscovery orders entered when the defendant's immunity claim turns at least partially on a factual question; when the district court is unable to rule on the immunity defense without further clarification of the facts; and which are narrowly tailored to uncover only those facts needed to rule on the immunity claim are neither avoidable nor overly broad." *Id.* at 507-08. *See also Gaines*, 928 F.2d at 707 (reversing district court's discovery order compelling the depositions of the defendants as "overly broad because it failed to limit the scope of the depositions to the issue of qualified immunity"); *Maxey v. Fulton*, 890 F.2d 279 (10th Cir. 1989) (remanding district court's discovery order on the ground that it did not adequately limit discovery to the issue of qualified immunity).

Hager argues that *Siegert v. Gilley*, 111 S.Ct. 1789 (1991), overrules these cases by holding that qualified immunity shields a government official from all discovery until the district court rules on a defendant's qualified immunity claim. We disagree. In *Siegert*, the Supreme Court posited the framework for analyzing a claim of qualified immunity. Under the holding in *Siegert*, the threshold inquiry is whether the plaintiff has alleged "the violation of a clearly established constitutional right." *Id.* at 1793. Stated another way, if a plaintiff does not allege the violation of a clearly established constitutional right, the holding in *Siegert* dictates that the suit must be dismissed without discovery.

However, we do not interpret the holding in *Siegert* to preclude narrowly tailored discovery aimed at uncovering facts essential to a district court's ruling on the qualified immunity claim. We are in substantial agreement with the Tenth Circuit's interpretation of the effect of *Siegert* on discovery in qualified immunity cases:

> "Discovery should not be allowed until the court resolves the threshold question whether the law was clearly established at the time the allegedly unlawful action occurred. The question is purely legal, and a court cannot avoid answering the question by framing it as factual. The court must first determine whether the actions defendants took are 'actions that a reasonable [person] could have believed lawful.' If the actions are those that a reasonable person could have believed were lawful, defendants are entitled to dismissal before discovery. If the actions are not those that a reasonable person could have believed were lawful, then discovery may be necessary before a motion for summary

> judgment on qualified immunity grounds can be resolved. However, any such discovery must be tailored specifically to the immunity question." *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992) (citations omitted).

Because Plaintiffs have alleged the violation of a clearly established constitutional right, we hold that *Siegert* does not prevent the district court from postponing ruling on Hager's qualified immunity defense pending his deposition. The parties have presented two very different versions of the events surrounding Poynor's death, and therefore, we agree with the district court that Hager's deposition is appropriate in order to resolve Hager's qualified immunity claim.

We note that the district court erroneously incorporated a subjective standard into its qualified immunity analysis when it stated that genuine issues of material facts existed concerning whether Hager acted in good faith.[3] It is well established that an objective standard governs the good faith determination under the qualified immunity principles enunciated by the Supreme Court. *Harlow*, 102 S.Ct. at 2738 (holding that objective reasonableness standard governs good faith element of qualified immunity analysis under federal law); *see also Anderson v. Creighton*, 107 S.Ct. 3034, 3038 (1987). The Texas Supreme Court recently adopted a similar objective good faith standard for a government official's claim of qualified immunity under Texas law. *City of Lancaster v.*

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[3] The district court cited an unpublished decision of this Court in support of this statement. *Hoffman v. Sheffield*, No. 93-1747 (5th Cir. April 28, 1994) (unpublished).

Chambers, 883 S.W.2d 650, 655-57 (Tex. 1994). Accordingly, Hager's subjective good faith is not relevant to the resolution of his claim of qualified immunity.[4]

Having rejected Hager's argument that a claim of qualified immunity inevitably shields a government official from all pretrial discovery, we turn to the discovery ordered by the district court, namely the deposition of Hager. Even though qualified immunity does not protect Hager from all pretrial discovery, it shields him from overly broad or avoidable discovery. *See, e.g Lion Boulos*, 834 F.2d 504. Although we recognize that, in theory, the district court's discovery order compelling the deposition of Hager might permit discovery of some facts beyond the limited scope of the qualified immunity issue, Hager does not point out any such areas in his brief.

More importantly, our review of the record indicates that Hager never sought below to limit the scope of his deposition to facts essential to his qualified immunity defense; rather, he consistently maintained that his claim of qualified immunity required a stay of all pretrial discovery until the district court ruled on his motion for summary judgment. Because Hager never sought to restrict the scope of his deposition, he has waived any complaint on this attempted appeal that the district

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[4] Our statement to the contrary (respecting Texas law claims) in *Hoffman*, rendered before the Texas Supreme Court's decision in *Chambers*, is no longer an accurate statement of the Texas law of qualified immunity. *Hoffman* does not say subjective good faith is relevant to qualified immunity from federal claims.

court's discovery order was not tailored sufficiently narrowly.

Conclusion

For the foregoing reasons, the appeal is

DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LINDA LARGENT, ET AL	*	
	*	
vs.	*	**3:92-CV-2322-R**
THE CITY OF DALLAS,	*	
TEXAS, ET AL	*	

ORDER OF REFERENCE
(Filed Mar. 15, 1993)

IT IS ORDERED under authority of 28 U.S.C. 636(b) and Rule 1.3 of the Local Rules of this Court, that the **Defendants' Motion for Summary Judgment and Brief, Defendants City of Dallas and Gordon Hager's Motion for Protective Order to Stay Discovery and Brief, and Plaintiffs' Motion for Expedited Consideration of Defendants' Motion and Brief** in this case be, and it is hereby, referred to United States Magistrate John B. Tolle for hearing, if necessary, and determination.

All future pleadings which are filed concerning these motions **shall be accompanied by a transmittal letter addressed to the Magistrate** so copies can be sent directly to him without delay.

SIGNED THIS 15th DAY OF March, 1993.

/s/ Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LINDA LARGENT, ET AL	]	
	]	
VS.	]	NO. 3-92-CV-2322-R
	]	
THE CITY OF DALLAS,	]	
ET AL	]	

ORDER
(Filed Apr. 14, 1993)

Under authority of 28 U.S.C. Sec. 636(b) and the Local Rules of this Court, Defendants' Motion for Protective Order to Stay Discovery, filed February 26, 1993, and Plaintiffs' Motion for Expedited Consideration of Defendants' Motion, filed March 11, 1993, were referred to the magistrate judge for disposition. And having reviewed the said motions and the responses thereto, and having heard the arguments of counsel, the said motions are granted in part and denied in part, as follows:

With the exception of the deposition of the prospective witness Brian Blakley, discovery in this action is stayed pending disposition of Defendants' Motion for Summary Judgment. The deposition of Brian Blakley may be taken at a time to be agreed upon by counsel, or upon proper notice. This order is based on the representation by counsel for plaintiffs that Blakley is suffering from a terminal illness, that he is not expected to live much longer, that Blakley's father will not permit counsel to secure an affidavit from Blakley because of his critical condition, and that Blakley's evidence is necessary for plaintiffs to make a proper response to the motion for

summary judgment and to demonstrate that there is a genuine issue of material fact to be tried.

It is so ORDERED.

Signed this 14th day of April, 1993.

/s/ John B. Tolle
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LINDA LARGENT, ET AL	§	
PLAINTIFFS,	§	
	§	
VS.	§	**3:92-CV-2322-R**
CITY OF DALLAS, ET AL	§	
	§	
DEFENDANTS.	§	

ORDER
(Filed Jan. 4, 1994)

1. The Scheduling Order of September 1, 1993 is VACATED. This case will be set for trial on the September 1994 trial docket.

2. The parties are directed to file any additional briefs concerning the defendant's Motion for Summary Judgment (filed February 26, 1994) by January 31, 1994. This matter is no longer referred to the United States magistrate Judge.

3. In view of the age of this case, the order staying discovery in this case is VACATED.

SIGNED ON THIS 4TH DAY OF JANUARY, 1994.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LINDA LARGENT and IRIS ESPARZA, Administratrix of the Estate of STANLEY LESTER POYNOR, Deceased, Plaintiffs,	)	
VS.	)	CIVIL ACTION NO. 3:92-CV-2322-R
THE CITY OF DALLAS, TEXAS and Dallas Police Officer GORDON HAGER, Defendants.	)	

ORDER
(Filed Feb. 16, 1994)

Defendants City of Dallas and Gordon Hager, having moved the court to reconsider its Order dated January 4, 1994, vacating the order staying discovery in this case, and requesting the court to reissue a protective order to protect Defendants from Plaintiffs' attempted discovery, upon the grounds that Defendants are entitled to a stay of all discovery based upon the asserted defense of qualified immunity, and it appearing to the court that Defendants are entitled to such protective order, it is

ORDERED, that Defendants City of Dallas and Gordon Hager's motion is GRANTED, and FURTHER ORDERS that discovery is stayed in this action, pursuant

to Fed.R.Civ.P.26(c), until Defendants' summary judgment motion is finally resolved.

DATED: FEB. 15, 1994

/s/ Jerry Buchmeyer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LINDA LARGENT and IRIS ESPARZA, Administratrix of the Estate of STANLEY LESTER POYNOR, Deceased,	§	
Plaintiffs,	§	NO. 3:92-CV-2322-R
vs.	§	
THE CITY OF DALLAS, TEXAS and Dallas Police Officer GORDON HAGER,	§	
Defendants.	§	

ORDER
(Filed May 2, 1994)

This Court issued an order, dated February 15, 1994, staying discovery in this action pending resolution of Defendant's Motion for Summary Judgment. This Court now orders that the Order Staying Discovery is vacated for the sole purpose of allowing Plaintiff to take the deposition of Defendant Gordon Hager. The Order Staying Discovery remains in effect for all other purposes. This Court further orders that such deposition must be taken within thirty (30) days. Decision on Defendant's Motion for Summary Judgment is stayed pending completion and transmittal to this court of that deposition.

It is so **ORDERED.**

SIGNED THIS 2 DAY OF MAY, 1994.

/s/ Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LINDA LARGENT and IRIS ESPARZA, ADMINISTRATRIX OF THE ESTATE OF STANLEY LESTER POYNOR	§	
VS.	§	**3:92-CV-2322-R**
THE CITY OF DALLAS, TEXAS AND DALLAS POLICE OFFICER GORDON HAGER	§	

ORDER
(Filed May 19, 1994)

If there are genuine issues of material facts concerning whether or not the defendant Gordon Hager performed his duties as a police officer in good faith, then the Defendant's Motion for Summary Judgment on the grounds of qualified immunity would be denied.[1] If there are no such genuine issues of material fact, then the defendant's qualified immunity motion will be granted.

Accordingly, the Defendant's Motion to Reconsider Partial Vacation of Discovery (filed May 16, 1994) is DENIED.

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[1] This precise issue was dealt with by this Court and by the Fifth Circuit in Hoffman v. Sheffield, No. 93-1747 (5th Cir. April 28, 1994) (affirming this Court's July 23, 1994 decision in CA 91-0973-R).

SIGNED ON THE 19th DAY OF May, 1994.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER, JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
APR 27 1995
OFFICE OF THE CLERK

No. 94-1624

In The

Supreme Court of the United States

October Term, 1994

GORDON HAGER,

Petitioner,

vs.

LINDA LARGENT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a government official's claim of qualified immunity always operate as an absolute bar to all discovery pending a ruling on the immunity defense?

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No. 94-1624

In The

Supreme Court of the United States

October Term, 1994

GORDON HAGER,

Petitioner,

vs.

LINDA LARGENT, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents agree with Petitioner's Statement of the Case except in following respects:

1. The United States District Court did not deny Petitioner's claim of qualified immunity and the Fifth Circuit Court of Appeals did not have jurisdiction of the appeal pursuant to 28 U.S.C. § 1291. The District Court ordered that Respondents could engage in very limited discovery (one deposition) prior to ruling on Petitioner's Motion for Summary Judgment based on qualified immunity. The Fifth Circuit Court of Appeals held that since "[t]he parties have presented two very different versions

of the events surrounding Poynor's death. . . . we agree with the district court that Hager's deposition is appropriate in order to resolve Hager's qualified immunity claim." (Petitioner's App. 8).

2. Petitioner fails to note that the witness Brian Blakely, whose deposition Respondents originally sought to take, was terminally ill. Rec. 206, 267, 319-320, 323.

SUMMARY OF THE ARGUMENT

The pretrial order of the District Court allows very limited discovery consisting of one deposition. Petitioner asserts his claim of qualified immunity should insulate him from all discovery. Respondents assert that although a pending defense of qualified immunity protects a public official from broad ranging and uncontrolled discovery, it is not in every case an absolute bar to all discovery. Given appropriate facts, limited discovery is not only allowed but required to enable the trial court to make a just decision. This is such a case.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit's Decision Allowing Very Limited Discovery (One Deposition) Pending a Ruling on a Qualified Immunity Defense Does Not Conflict with Decisions of this Court.

Petitioner asserts that since he has filed a Motion for Summary Judgment claiming the defense of qualified immunity, he has an absolute right to a complete stay of

all discovery. Petitioner argues that under *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), an assertion of qualified immunity creates a bar to all discovery without regard to the facts of an individual case. Petitioner appears to argue that he is entitled to summary judgment, but that issue is not before the Court. Respondents respectfully suggest that Petitioner has confused the protection of summary judgment based on qualified immunity with the right to a stay from all discovery based on a claim of qualified immunity.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), this Court changed the test for qualified immunity from an inquiry into subjective bad faith to an objective determination of the legal reasonableness of the action. In changing the test, the Court was careful to limit the scope of the decision:

> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. . . .

Harlow, 457 U.S. at 819.

As Petitioner notes in his brief, the Supreme Court, in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97

L.Ed.2d 523 (1987), elaborated on the relationship between the qualified immunity defense and discovery:

> One of the purposes of the *Harlow* qualified immunity standard is to protect public officials from the "broad ranging discovery" that can be "peculiarly disruptive of effective government." 457 U.S. at 817, 73 L.Ed.2d 396, 102 S.Ct. 2727 (footnote omitted). For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible state of a litigation. [citation omitted]

Anderson v. Creighton, 483 U.S. at 646 n.6 (Petition at 8).

Petitioner failed to complete the quote from *Anderson* which continues as follows:

> Thus, on remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery. Cf. ibid. If they are not, and *if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved.* Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity. [emphasis added]

Anderson v. Creighton, 483 U.S. at 646-647 n.6.

In other words, this Court recognized that if the actions alleged by a Plaintiff were not actions that meet the *Harlow* reasonableness test and are different from the

actions that Defendant claims he took, then discovery must proceed before the issue of qualified immunity on summary judgment may be determined. Respondents respectfully suggest that *Anderson* clearly establishes that *Harlow* was not intended to and did not bar all discovery, but that discovery should be specifically "tailored" to the question of the qualified immunity.

Petitioner argues that this Court's decision in *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) has eliminated even narrowly tailored discovery in the context of a pending qualified immunity test. Respondents suggest that in *Siegert*, this Court clarified the priorities in analyzing a claim of qualified immunity, i.e., a court must first determine whether the plaintiff has alleged the violation of clearly established constitutional right. If the plaintiff's allegations do not meet this threshold inquiry, then the suit is to be dismissed without discovery. That analytical framework does not suggest that all discovery is barred in all cases pending the resolution of a qualified immunity defense.

Contrary to Petitioner's assertion, the Fifth Circuit's rulings are neither internally inconsistent nor in conflict with rulings of this Court. The Fifth Circuit's holdings are and have been consistent with the *Siegert* framework of making the threshold inquiry that of whether the plaintiff has alleged the violation of a clearly established constitutional right. *See Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986) ("Stripped of its conclusory allegations and the technical buzz words liberally sprinkled throughout, the plaintiff's pleadings allege, at best, a negligence action. Recently, the Supreme Court specifically held that a Sec. 1983 civil rights claim cannot be based on a negligent

failure to protect."); *Elliott v. Perez*, 751 F.2d 1472, 1476 (5th Cir. 1985) ("In view of the purposes of the immunity defense, as declared by the Supreme Court and this Court, we conclude that allowing broadly-worded complaints, such as those of the plaintiffs here, which leaves to traditional pretrial depositions, interrogatories, and requests for admission the development of the real facts underlying the claim, effectively eviscerates important functions and protections of official immunity.")

The Fifth Circuit opinions are also consistent with the *Harlow* and *Anderson* mandates that discovery, if allowed, be appropriately limited in questions of qualified immunity. *See, e.g., Gaines v. Davis*, 928 F.2d 705, 707 (5th Cir. 1991) ("If the court had carefully tailored its order to allow the parties to only uncover those facts necessary to rule on Davis' immunity defense, we would not have jurisdiction to rule on the order at this time.") The Fifth Circuit has limited discovery in the context of the immunity question to cases involving fact questions that need clarification before the district court can fairly rule on the immunity issue. *See Geter v. Fortenberry*, 849 F.2d 1550, 1560 (5th Cir. 1988) ("[N]either we nor the district court can rule on his immunity defense until the factual dispute concerning his identification tactics is resolved.") In *Lion Boulos v. Wilson*, 834 F.2d 504 (5th Cir. 1987), the Fifth Circuit identified this class of cases:

> *Harlow, Mitchell* and *Jacquez* make clear that qualified immunity does not shield government officials from all discovery but only from discovery which is either avoidable or overly broad. Discovery designed to flesh out the merits of a plaintiff's claim before a ruling on

> the immunity defense or discovery permitted in cases where the defendant is clearly entitled to immunity would certainly fall within this category. Immediate appeal would lie from these orders because *Mitchell, Harlow* and *Jacquez* require that immune defendants be exempt from avoidable, burdensome pretrial matters.
>
> However, a second class of discovery permitted before a ruling on a defendant's motion to dismiss does not encroach upon his qualified immunity claim. Discovery orders entered when the defendant's immunity claim turns at least partially on a factual question; when the district court is unable to rule on the immunity defense without further clarification of the facts; and which are narrowly tailored to uncover only those facts needed to rule on the immunity claim are neither avoidable nor overly broad. Such orders are not immediately appealable. . . .

Lion Boulos, 834 F.2d at 507-508.

Other circuits have adopted this rationale. *See, e.g., Maxey by Maxey v. Fulton*, 890 F.2d 279 (10th Cir. 1989). *See also, Velasquez v. Senko*, 813 F.2d 1509 (9th Cir. 1987). Petitioner's analysis of the cases cited ignores the facts of the individual cases and often the holdings. Petitioner, for example, recites that it was the Fifth Circuit's "reliance upon *Gaines* and *Lion Boulos*, rather than following *Siegert* that necessitates this petition." (Petition at 10). In *Gaines v. Davis*, 928 F.2d 705 (5th Cir. 1991), the Court held the district court's discovery order was overly broad under *Harlow* and reversed and remanded. Only if *Siegert* is read to create an absolute bar to all discovery in all cases involving the defense of qualified immunity is there any

inconsistency between the holdings of the Fifth Circuit and those of this Court.

II. The Assertion of a Defense of Qualified Immunity Should Not Bar All Discovery in Cases Involving Factual Disputes as to the Actions of the Government Official.

In the case before the Court, Respondents have alleged that Petitioner used excessive force by administering gun shot wounds to Stanley Poynor which resulted in Poynor's death. Indeed, in considering the use of excessive force it is difficult to imagine any force more excessive than multiple gun shot wounds administered at point blank range. The events surrounding the Petitioner's actions are disputed. As the Fifth Circuit stated, "the parties have presented two very different versions of the events surrounding Poynor's death. . . . " (Petitioner's App. 8). The Fifth Circuit held that Respondents have alleged the violation of a clearly established constitutional right and that limited discovery, i.e. the one deposition of Petitioner, is appropriate to resolve the Petitioner's qualified immunity claim. (Petitioner's App. 8). Respondents have unquestionably alleged the violation of a clearly established constitutional right. *See Brower v. County of Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989). The order allowing one deposition is not "broad ranging" or "uncontrolled" discovery. It will constitute the only discovery by Respondents thus far and it will serve justice by allowing some exploration of the inconsistencies and contradictions in the affidavits on which Petitioner relies to support his motion for summary judgment.

Harlow requires an objective determination of the legal reasonableness of the public official's actions. However, when there is a factual dispute as to the actions and not just the reasonableness of the actions, it follows that some discovery may be necessary before the Harlow test can be applied.

> We caution that, despite the rule we announce today, many denials of claimed immunity in pretrial proceedings will not be in a posture for appellate review, in that entitlement to immunity will turn on disputed questions of fact or will otherwise be inextricably bound up with the merits of the claims. While *Harlow* made easier the pretrial resolution of immunity claims by its elimination of the subjective prong of good faith, there remain many cases where such early decisions cannot be made.

Williams v. Collins, 728 F.2d 721, 728 n.7 (5th Cir. 1984). This was also noted in *Anderson*, 483 U.S. at 646-647 n.6. To allow limited discovery is not a denial of the official's potential right to summary judgment based on qualified immunity. Indeed, to the extent discovery will assist the official in explaining prior inconsistences and/or contradictions, it may aid an official's quest for summary judgment. On the other hand, it may aid a plaintiff against an official who stonewalls and attempts to hide behind a summary judgment affidavit and a claim of qualified immunity. This Court has recognized the policy concerns with immunity defenses. "The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative." *Harlow*, 457 U.S. at 813-814. This Court has also declined to extend the defense of absolute immunity. *See Harlow*, 457 U.S. 800;

Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). In the face of disputed facts, this Court should not extend an absolute shield from any discovery based on a claim of qualified immunity. Such an absolute shield would deprive the trial courts of all discretion and undoubtedly lead to manifest injustice in many cases.

CONCLUSION

Respondents pray that this Court deny Gordon Hager's Petition for Writ of Certiorari because the case presents no issue appropriate for this Court's review and because the lower courts' holdings are not in error.

Respectfully submitted,

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